II. The Majority's Opinion Will Not Lead To Greater Uncertainty Or Illogical Or Inconsistent Results.

The majority's opinion stands as a model in organization, logic, and clarity. After setting forth the framework that it will use (*Chevron*), the majority states that Congress did not clearly express its intent with respect to the meaning of "worksite" for an employee who is jointly employed. Accordingly, the Court must apply the second step of *Chevron*, i.e., whether the regulation is arbitrary, capricious, or manifestly contrary to the FMLA.

Stating its conclusion that, as applied to a jointly employed employee with a fixed place of work, the regulation is not valid, the balance of the majority's opinion lays out the three indicia of Congressional intent that led to its conclusion (i.e., (1) the common meaning of the term "worksite;" (2) the purpose of the FMLA, with particular attention to the so-called 50/75 provision; and (3) the arbitrary distinction between sole and joint employers in light of the 50/75 provision (which provision contains no suggestion that joint employment should be treated differently)), followed by several pages (App. A-16 to A-21) addressing specifically, and in great detail, each of the counter-arguments that were presented by the Secretary and the Petitioner.

Second, a temporary placement employee who is placed in different convenience stores on a rotating basis clearly has no fixed workplace. Accordingly, under the majority's decision, that employee's FMLA eligibility would still be governed by 29 C.F.R. § 825.111(a)(3), i.e., the employee's "worksite" is the primary employer's office from which the employee is assigned or reports. Hence, that employee's FMLA coverage would *not* vary daily.

No purpose would be served by repeating those points here, and they squarely rebut Petitioner's assertion that the majority's opinion will lead to illogical or inconsistent results.[3] Petitioner's contention that the majority's decision will lead to "greater uncertainty" was not, however, addressed by the majority. This contention appears to be based upon a purported difficulty in distinguishing between a "fixed worksite" and a "non-fixed worksite":

> The majority deemed Ms. Harbert's assignment to Sunset Manor to be "fixed" as compared to an employee of a temporary help agency who, according to the majority, "does not have a permanent, fixed worksite." *Harbert*, 391 F.3d 1153. What then is a "fixed" worksite as compared to a non-fixed worksite? Can a non-fixed worksite become "fixed" if the employee works at that worksite long enough? What about an employee of a temporary help agency who receives a long-term assignment? Would that employees' place of work be considered "fixed;" or does the mere fact that the employee was employed by a temporary help agency make her worksite "non-fixed"? Is the "fixed" or "non-fixed" nature of the joint employee's assignment determined by the joint employer's type of business? The distinction is anything but clear.

Petition, p. 10.

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[3] Before leaving the subject of "logic," what if Healthcare actually did have more than 50 employees within 75 miles of Sunset Manor, so that it could take advantage of their geographic proximity to temporarily fill-in for Harbert while she was out of work, but Healthcare's Regional Office from which Harbert was assigned or reported did not have 50 employees within 75 miles. Pursuant to § 825.111(a)(3), because Harbert was jointly employed by two employers, she would *not* be entitled to FMLA leave. Would such a result make any sense whatsoever given the clear purpose of the 50/75 provision?

The simple response to Petitioner is that it was Congress that chose the phrase "fixed worksite" (in both the Senate and House Committee Reports), and it was Congress that decided that there would be a difference in the treatment between those who had a "fixed worksite" and those who did not. (Conversely, Congress did not make any distinction between being solely employed or being jointly employed.) Hence, even assuming for the sake of argument that the distinction between "fixed" and "non-fixed" is a difficult distinction to make, it is a distinction the making of which Congress has mandated.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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